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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

NORTHERN KENTUCKY MEDICAL SOCIETY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court that is applying the Federal Arbitration Act adopt a distinct test for the arbitrability of statutory and tort claims that considers only whether the elements of those claims reference the parties' contract and ignores whether they "touch matters" within the scope of the parties' arbitration agreement?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Kentucky Court of Appeals were plaintiffs-appellees Northern Kentucky Medical Society, Academy of Medicine of Cincinnati, E. Douglas Baldridge, M.D., P. Scott Becker, M.D., A. Lee Greiner, M.D., Victor Schmelzer, M.D., Karl S. Ulicny, M.D., and Raymond Will, M.D., and defendants-appellants United HealthCare of Ohio, Inc., Anthem Health Plans of Kentucky, Inc. d/b/a Anthem Blue Cross and Blue Shield, and Aetna Health, Inc. Anthem and Aetna were dismissed from the case by the Kentucky Supreme Court.

This petition is filed on behalf of United HealthCare of Ohio, Inc. No publicly held companies own 10% or more of United HealthCare of Ohio, Inc. United HealthCare of Ohio, Inc. is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Inc., a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to halt a growing trend in which state courts are determining the arbitrability of statutory and tort causes of action using a test that egregiously undermines the Federal Arbitration Act's policy favoring arbitration and the Court's arbitration precedent. By focusing restrictively on whether the elements of a claim reference the parties' contract, and not on whether the claims "touch matters" within the scope of the parties' arbitration agreement, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985), the Kentucky Court of Appeals disregarded the parties' expressed intent to arbitrate all disputes related to the parties' business relationship. The court adopted a recent holding in parallel litigation in Ohio against the same managed care defendants

concerning the same broad arbitration agreement, concluding that state antitrust claims could not be arbitrated because the elements of the claims did not reference the contract at issue—even though the contract embodied the precise price-fixing conspiracy alleged as the antitrust violation. Under this contract-reference rule of arbitrability, parties in Kentucky and Ohio may evade their arbitration obligations through artful pleading and semantics, even when the substance of a claim unquestionably touches matters within the scope of the parties' agreement to arbitrate. The Court should determine whether the FAA and the Court's established arbitrability principles permit that result.

Kentucky's dangerous distortion of arbitration law is compounded by the Ohio Supreme Court's approval of the identical contract-reference test in *Academy of Medicine of Cincinnati* v. *Aetna Health, Inc.*, 842 N.E.2d 488 (Ohio 2006). Because these two cases present the same arbitrability question and, together, demonstrate a growing state-court trend, United is simultaneously filing a petition for writ of certiorari in the Ohio case that reiterates the arguments in this petition.[1]

The Kentucky and Ohio decisions assail the fundamental premise of the federal arbitration system, which requires courts to respect and enforce contracting parties' agreements not to litigate particular categories of disputes by designating them for arbitration. In adopting a constrictive test for the arbitrability of statutory and tort causes of action, the Kentucky and Ohio courts ignored the Court's consistent directives that, under the FAA, arbitration agreements must be implemented according to their negotiated terms, that they must be interpreted with a presumption in favor of arbitrability, and that broad arbitration agreements must be faithfully enforced to effectuate their liberal scope, rendering

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[1] See Petition for Writ of Certiorari, *United HealthCare of Ohio, Inc.* v. *Acad. of Med. of Cincinnati* (No. 05-____).

arbitrable all disputes involving allegations that touch matters covered by the arbitration agreement. See, *e.g.*, *Mitsubishi*, 473 U.S., at 625-626 & n.13.

Moreover, the Kentucky and Ohio decisions directly conflict with the Court's explicit recognition of the arbitrability of statutory causes of action in *Mitsubishi*, 473 U.S., at 614 (international antitrust claims), *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 238, 242-243 (1987) (RICO and §10(b) Securities Exchange Act claims), *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act claims), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401, 407 (2003) (RICO claims). The Kentucky and Ohio decisions also specifically conflict with the Second Circuit's analysis of the arbitrability of price-fixing conspiracy claims, in particular, in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163 (CA2 2004).

Under Kentucky and Ohio's unsupportable arbitrability approach—which implements a standard previously applied by Texas and South Carolina courts as well—these courts now treat arbitration agreements differently than other state and federal courts whenever litigants bring statutory and tort claims without explicitly referencing the parties' underlying contract. This rule not only puts Kentucky and Ohio at odds with other jurisdictions, but also invites gamesmanship and forum shopping. The Court should grant the petition to protect arbitral rights and halt the end run around arbitration reflected by this growing state-court trend.

OPINIONS AND ORDERS BELOW

The Boone County Circuit Court denied defendants' motions to compel arbitration and to dismiss or stay the proceedings in an unpublished opinion. See App. 1a. The Kentucky Court of Appeals's decision is available at *Anthem Health Plans of Kentucky, Inc.* v. *Academy of Medicine of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-

MR, 2003-CA-000754-MR, 2004 Ky. App. LEXIS 315 (Ky. App. Oct. 29, 2004), review denied *sub nom. Anthem Health Plans of Ky., Inc.* v. *Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006). See App. 4a. That court subsequently denied a petition for rehearing in an unpublished order. See App. 12a. The Kentucky Supreme Court denied discretionary review in an unpublished order directing that the court of appeals's opinion not be published. See App. 13a..

JURISDICTION

The Kentucky Supreme Court denied discretionary review on February 15, 2006. App. 13a. The Court has jurisdiction under 28 U.S.C. §1257(a). See *Cox Broad. Corp.* v. *Cohen*, 420 U.S. 469, 482-483 (1975).

STATUTORY PROVISIONS INVOLVED

The enforcement provision of the Federal Arbitration Act provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The FAA permits parties to petition a court for an order compelling arbitration when another party does not arbitrate as required by an arbitration agreement:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the

controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S.C. §4.

The relevant state antitrust statutory provision from Kentucky appears in the appendix.

STATEMENT OF THE CASE

United HealthCare of Ohio, Inc., enters into provider agreements with physicians and physician groups under which the providers agree to accept rates established in the contract when they treat individuals covered by health benefit plans insured or administered by United. These contracts establish and govern the parties' relationships, including the categories of medical services, claim-reimbursement procedures, and fee schedules. The provider agreements require United to reimburse contracting physicians who provide covered services to members of United health plans and set out the reimbursement rates for particular types of services.

Each of the respondents in this case is a party to a provider agreement with United. In addition to setting fee schedules that establish the reimbursement rates to be paid for medical services provided to patients covered by United's health plans, each contract also addresses the possibility of disagreements in the course of the parties' relationship by including an expansively worded arbitration clause that mandates arbitration of "any disputes about their business relationship."[2] See App. 6a.

Six physicians and two medical associations practicing in the Northern Kentucky/Greater Cincinnati area filed this state antitrust suit against United and two other health care companies.[3] The single-count, class-action complaint asserts an antitrust claim under the Kentucky Consumer Protection Act, KY. REV. STAT. §367.175, alleging that the reimbursement rates set by the contracts containing the parties' arbitration clauses are unreasonably low as a result of a

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[2] United's provider contract with respondent Dr. A. Lee Greiner requires arbitration of disputes that "arise out of or relate to" the contract. See App. 2a.

[3] In the trial court, the defendants included Anthem Blue Cross and Blue Shield and Aetna Health, Inc.

conspiracy among the defendant managed care companies to fix prices in violation of state law. See Pls.' Compl. 2-3, 5-6, 11.

As remedies for the alleged wrongdoing, respondents seek an injunction ordering United to cease and desist from the alleged unlawful conspiracy to artificially depress physician reimbursement rates reflected in the provider agreements and to modify the parties' contracts by setting reimbursement rates at reasonable levels in relation to comparable regional markets. *Id.*, at 12. Respondents also seek damages for the compensation they contend should have been paid beyond the amount of the contractual reimbursement rates they received for providing services. *Ibid.*

Because the allegations center on the parties' business relationship, United and its codefendants invoked §4 of the Federal Arbitration Act, 9 U.S.C. §4, and §417.060 of the Kentucky Arbitration Act, KY. REV. STAT. §417.060, to compel arbitration of the claims under the parties' arbitration agreements. United and the other defendants also moved to dismiss or, alternatively, to stay the proceedings pending arbitration pursuant to §3 of the FAA, 9 U.S.C. §3, as well as §417.060 of the Kentucky Arbitration Act, KY. REV. STAT. §417.060.

Limiting the scope of arbitration to contractual claims, the trial court ruled that the price-fixing conspiracy claim was not arbitrable. App. 2a. That court concluded that respondents' antitrust claim did not "arise out of or relate to the contracts" between the parties and that "the parties never agreed to arbitrate claims that were independent of any breach of contract." *Ibid.*

In parallel litigation in Ohio, another group of physicians sued United and other managed care companies, alleging violations of Ohio antitrust law based on the same rate-fixing theory as in Kentucky. In that case, the Ohio Court of Appeals applied the same contract-reference standard used by

the Kentucky trial court and held that the Ohio antitrust claims were not arbitrable. See *Acad. of Med. of Cincinnati* v. *Aetna Health, Inc.*, 800 N.E.2d 1185 (Ohio App. 2003), aff'd, 842 N.E.2d 488 (Ohio 2006).

Subsequently, on appeal of the Kentucky trial court's decision, the Kentucky Court of Appeals adopted, verbatim, the reasoning of the Ohio appellate court and refused to compel arbitration or stay the proceedings. App. 10a. Citing a supposed "reluctance by the federal and state courts to compel arbitration of antitrust claims," and expressing its belief that the "there is soundness in the reasoning that public policy considerations favor judicial resolution," App. 7a, 8a, the court—through its incorporation of the Ohio opinion—held that the Kentucky antitrust claims were not within the scope of the arbitration agreements because the elements of those claims did not reference the contracts. See App. 9a (concluding that "[t]he express elements" of the price-fixing claim "do not depend, as a matter of law, on the provider agreements," thus the claims against United were not arbitrable (quoting *Acad. of Med. of Cincinnati*, 800 N.E.2d, at 1187)).

Following the Kentucky decision, the Ohio Supreme Court affirmed the Ohio Court of Appeals's contract-reference arbitrability test as an accurate reflection of federal law, articulating an arbitrability standard for statutory and tort causes of action identical to that of Kentucky. *Acad. of Med. of Cincinnati*, 842 N.E.2d, at 494. Two justices dissented, reasoning that the majority's arbitrability test impermissibly deviated from pro-arbitration federal principles by asking solely whether the plaintiffs' claims referenced the parties' contract, rather than whether, in accordance with *Mitsubishi*, 473 U.S., at 625 n.13, the claims touch matters that fall within the scope of the parties' broad agreement to arbitrate disputes about their business relationship. See *Acad.*

of Med. of Cincinnati, 842 N.E.2d, at 495-496 (Lanzinger, J., dissenting).

Together, the Kentucky and Ohio opinions stake out an approach to arbitrability that, as the dissenting Ohio justices observed, impermissibly deviates from the established "federal standard that inquires whether the allegations underlying the claims touch matters covered by the agreement." *Ibid.*

REASONS FOR GRANTING THE WRIT

The Kentucky Court of Appeals's arbitrability standard contravenes the FAA's strong policy favoring arbitration, as reflected in the arbitrability principles articulated by the Court, including the Court's express recognition of the arbitrability of antitrust claims. By insisting that elements of claims reference parties' underlying contracts as a prerequisite to compelling arbitration under the FAA, Kentucky's test renders nonarbitrable nearly all tort and statutory causes of action, which will almost never refer to or directly depend on an underlying contract. Thus, under the standard adopted by Kentucky—and Ohio as well—the antitrust claims in this case, and statutory and tort claims generally, must be litigated in derogation of the parties' contractual bargains to arbitrate—even under the broadest of arbitration clauses. That contract-reference approach eviscerates the protections afforded to arbitration by the FAA. It also creates an untenable circumstance in which arbitrability under the FAA is treated differently in the state courts of Kentucky and Ohio than elsewhere, encouraging litigants to forum shop to escape their arbitration commitments. Because this case presents an important federal question on which the Kentucky and Ohio decisions conflict with relevant decisions of the Court, and of the federal courts of appeals, the Court should grant the petition. SUP. CT. R. 10(b), (c).

I. KENTUCKY'S ARBITRABILITY STANDARD CONFLICTS WITH ESTABLISHED ARBITRABILITY PRINCIPLES ARTICULATED BY THIS COURT AND THE FEDERAL COURTS OF APPEALS.

A. The National Policy Favoring Arbitration Applies Equally to State Courts.

Through the FAA, Congress "reverse[d] the longstanding judicial hostility to arbitration agreements" and "place[d] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S., at 24; see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-13 (1984). Additionally, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S., at 10.

In pursuing its clear objective of ensuring the enforcement of agreements to arbitrate, Congress did not limit the applicability of its mandates to federal courts; rather, it expressly rejected the notion that enforcement of arbitration rights might depend on the forum in which they are asserted. *Id.*, at 15; see also *Mitsubishi*, 473 U.S., at 625-626. Indeed, the two problems against which Congress legislated were endemic to state courts: a common-law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. *Southland*, 465 U.S., at 14. Congress's purpose in enacting the FAA, therefore, "was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." *Id.*, at 13 (internal quotation marks and citation omitted).

B. Kentucky's Arbitrability Standard for Non-Breach-of-Contract Claims Contravenes Fundamental Principles for Analyzing the Scope of FAA-Governed Arbitration Agreements.

The Kentucky test for arbitrability—whether an action can be maintained without reference to the underlying contract—conflicts with the national policy favoring arbitration that is embodied in the FAA and in the arbitration precedent of this Court and the federal courts of appeals. Coupled with Ohio's approval of the identical, impermissibly constrictive arbitrability standard, the Kentucky decision exemplifies a state-court trend of undermining arbitration of statutory and tort claims in a manner that fundamentally guts the arbitral protections Congress enacted in the FAA, warranting the Court's intervention. See also, *e.g.*, *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875-876 (S.C. App. 2005) (noting breadth of arbitration clause covering "all disputes, controversies or claims of any kind and nature" but refusing to compel arbitration of business-tort claims by a borrower against a finance corporation for misuse of personal information, concluding that the claims could be "maintained without reference to the contract" between the borrower and the bank); *Loy* v. *Harter*, 128 S.W.3d 397, 403-405 (Tex. App. 2004) (denying arbitration of business-tort claim for breach of fiduciary duty against a company's director and CFO after concluding that the claim "could be maintained without reference to the contract" governing his employment and was nonarbitrable as unrelated to his employment relationship).

Kentucky's contract-reference arbitrability standard conflicts with the approach of courts that have refused to carve out an exception from established arbitrability principles whenever litigation involves statutory or tort claims. As the Court has made clear, the FAA's "federal policy favoring arbitration . . . is not diminished when a party bound by an

agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S., at 225-226 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). "'[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act 'in controversies based on statutes.'" *Id.*, at 226 (quoting *Mitsubishi*, 473 U.S., at 626-627). Indeed, the Court's longstanding precedent establishes that antitrust claims, and statutory claims generally, are arbitrable. See, *e.g.*, *PacifiCare*, 538 U.S., at 405-406 (RICO claims); *Gilmer*, 500 U.S., at 26 (ADEA claims); *McMahon*, 482 U.S., at 230-233 (RICO and Securities Exchange Act claims); *Mitsubishi*, 473 U.S., at 627, 632-637 (international antitrust claims).

The Kentucky court, however, displayed a judicial hostility to arbitration by establishing a distinct test for arbitrability of statutory and tort causes of action that distorts the federal arbitrability standard in a manner that critically deviates from the FAA's mandates and settled federal arbitration precedent. Indeed, its decision begins with the erroneous observation that "[t]here has been . . . reluctance by the federal and state courts to compel arbitration of antitrust claims," relying on the long-dead *American Safety* doctrine, under which courts once viewed antitrust claims as inherently unsuitable for arbitration. See App. 7a-8a & n.7; see also *Am. Safety Equip. Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 826-829 (CA2 1968). The Court repudiated that belief over twenty years ago. See *Mitsubishi*, 473 U.S., at 627, 632-637; see also, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *DaimlerChrysler Motors Corp.*, 271 F.3d 6, 11 (CA1 2001); *Kotam Elecs., Inc.* v. *JBL Consumer Prods., Inc.*, 93 F.3d 724, 727 (CA11 1996) (en banc) (explaining that *Mitsubishi* "dismantl[ed] all of the *American Safety* policy considerations"); *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441, 1442 (CA9 1994) (explaining that *Mitsubishi* involved "the Court's meticulous step-by-step disembowelment of the *American Safety* doctrine"). Far

from displaying reluctance, federal district courts and state courts have routinely compelled arbitration of antitrust claims. See, *e.g.*, *N.Y. Cross Harbor R.R. Terminal Corp.* v. *Consol. Rail Corp.*, 72 F.Supp.2d 70 (EDNY 1998); *Hunt* v. *Up N. Plastics, Inc.*, 980 F.Supp. 1046 (Minn. 1997); *Crown Homes, Inc.* v. *Landes*, 27 Cal.Rptr.2d 827, 834 (Cal. App. 1994).

In *Mitsubishi*, the Court not only rejected a distrust of arbitration for antitrust and other statutory claims, but also required arbitration when a dispute's allegations "touch matters" covered by the parties' arbitration agreement. *Mitsubishi*, 473 U.S., at 625 n.13. Federal courts of appeals, in conflict with the Kentucky and Ohio courts, have adhered to *Mitsubishi*'s touch-matters test for tort and statutory claims, requiring a "focus on the factual allegations in the complaint rather than the legal causes of action asserted . . . whatever the legal labels attached." *Genesco, Inc.* v. *T. Kalcuchi & Co., Ltd.*, 815 F.2d 840, 846 (CA2 1987) (holding that torts can be covered by arbitration clauses "if the allegations underlying the claims 'touch matters' covered by the [agreement]"). State courts, too, have recognized the propriety of applying the touch-matters test to claims other than breach of contract. See, *e.g.*, *MS Credit Ctr., Inc.* v. *Horton*, — So.2d —, No. 2004-CA-01699-SCT, 2006 WL 408415, at *6 (Miss. Feb. 23, 2006) (analyzing arbitrability of business-tort claims under the touch-matters test).

Consistent with the touch-matters test, courts of appeals have rejected attempts to evade arbitration by artfully pleading, as torts, claims relating to the parties' contractual or business relationships. See, *e.g.*, *Fazio* v. *Lehman Bros.*, 340 F.3d 386, 395 (CA6 2003) ("Even real torts can be covered by arbitration clauses if the allegations underlying the claims touch matters covered by the agreement.") (original brackets, citation, and quotation marks omitted); *Fyrnetics, (H.K.) Ltd.* v. *Quantum Group, Inc.*, 293 F.3d 1023, 1030 (CA7 2002)

(rejecting attempt to avoid arbitration by casting allegations as torts of negligence and misrepresentation); *Pennzoil Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (CA5 1998) (holding that a broad arbitration agreement "embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute"); *Gregory* v. *Electro-Mech. Corp.*, 83 F.3d 382, 384 (CA11 1996) ("Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted.").[4] The Kentucky opinion, however, will encourage artful pleading by hinging arbitrability on whether the complaint references the contract containing the arbitration clause, effectively limiting arbitration to breach-of-contract claims.

C. The Kentucky Standard Conflicts with the Second Circuit's Use of the Touch-Matters Test for Price-Fixing Conspiracy Claims.

The Kentucky opinion conflicts not only generally with the touch-matters test from *Mitsubishi* and its progeny, but also specifically with the Second Circuit's decision in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163 (CA2 2004), which used the touch-matters standard to determine the arbitrability of price-fixing conspiracy claims against ocean carriers whom the plaintiffs alleged exploited their market power to fix worldwide shipping rates. *Id.*, at 167-168, 172-173. Analyzing precisely the type of dispute that this case presents, the Second Circuit reversed the trial court's

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[4] Moreover, when, as in this case, the arbitration agreement is broad, courts have declined to carve out categories of claims from the expansive scope of the parties' arbitration agreement. See *Brown* v. *ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221 (CA11 2000) (explaining that use of the phrase "any dispute" in an arbitration agreement means that the "parties agreed to arbitrate any and all claims against each other, with no exceptions"); see also, *e.g.*, *Genesco*, 815 F.2d, at 846.

ruling that the claims were nonarbitrable because they could be proven without reliance on the parties' contracts. *Id.*, at 168.

The Second Circuit acknowledged that the price-fixing conspiracy allegations "rest[ed] on factual allegations which concern matters beyond the making of a particular contract between the parties and the performance of its terms" and therefore "will not focus exclusively 'upon the parties' conduct under the terms of the charter.'" *Id.*, at 175. Nonetheless, the court reasoned that the plaintiffs could not have suffered the damages from the alleged price fixing had they not entered into the contracts, "each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.'" *Ibid.* Accordingly, the price-fixing claims, though purportedly extra-contractual, arose out of the contracts and fell within the parties' broad arbitration agreements. *Id.*, at 176 (holding that antitrust disputes "unquestionably involve a core issue of the contracts between the parties—allegations that the price terms set forth in those contracts have been artificially inflated as a result of the price-fixing conspiracy").[5]

Under *JLM*'s reasoning, the price-fixing allegations in this case would plainly fall within the scope of the parties' broad arbitration agreement, which the Kentucky court's contrary decision eviscerates based on the statutory nature of the claims. By adopting a narrow test for statutory causes of

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[5] A district court within the Second Circuit similarly applied the touch-matters standard in determining the arbitrability of claims alleging that banks engaged in price fixing regarding currency conversion fees when cardholders conducted foreign currency transactions with their credit cards and the fixed prices appeared on the credit card accounts. *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 406, 410 (SDNY 2003). The court held that the claims were arbitrable because the terms of plaintiffs' use of the credit-card accounts were governed by the cardholder agreements containing the arbitration clause. *Ibid.*

action that, as a practical matter, will render them non-arbitrable in virtually every case, the Kentucky and Ohio courts conflict with this Court's and lower federal and state courts' accepted recognition that statutory claims are arbitrable under the same conditions as other claims: when they touch matters within the scope of the parties' arbitration agreement.

D. The Kentucky Decision Contravenes the Court's Directive to Construe Arbitration Agreements in Favor of Arbitration.

The Kentucky court not only instituted an impermissibly restrictive arbitrability standard for statutory claims, but also violated fundamental arbitrability principles by disregarding the requirement that courts construe arbitration agreements in favor of arbitration. See, *e.g.*, *Mitsubishi*, 473 U.S., at 625; *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985). Under the FAA, any doubts about arbitrability must be resolved in favor of coverage, and arbitration must be compelled unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co* , 363 U.S. 574, 589 (1960); see also *Moses H. Cone*, 460 U.S., at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Despite its duty to construe the United arbitration agreements broadly under the Court's precedent, the Kentucky court's impermissibly constrictive scope analysis defeated the parties' agreement to arbitrate "any disputes about their business relationship." Under a proper analysis, as the Ohio Supreme Court dissent recognized regarding antitrust claims in the parallel Ohio litigation, respondents' price-fixing conspiracy allegations plainly touch matters concerning the parties' business relationship because the contracts "allegedly contain the evidence of anticompetitive conduct and financial

harm" and "the reimbursement rates allegedly implicating unlawful restraint." *Acad. of Med. of Cincinnati*, 842 N.E.2d, at 496 (Lanzinger, J., dissenting). Accordingly, as the Ohio dissent concluded, "[t]he antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship' between the physicians and United Healthcare." *Ibid.*

Because the price-fixing conspiracy allegations necessarily center on the parties' business relationship, the Kentucky court's refusal to compel arbitration and its creation of a distinct, narrow arbitrability standard for statutory and tort claims reflect a revived judicial hostility to arbitration that is compounded by Ohio's implementation of an identical and equally restrictive standard. In light of this state-court trend—which includes similar holdings from Texas and South Carolina[6]—the Court should grant the petition to clarify whether, as *Mitsubishi* and *McMahon* indicated, 482 U.S., at 225-226, 473 U.S., at 626-627, the FAA, the national policy favoring arbitration, and this Court's admonition to faithfully enforce the negotiated terms of parties' arbitration agreements apply equally to motions to compel arbitration of statutory claims or whether, as Kentucky and Ohio concluded, courts should enforce arbitration rights only when the elements of such claims expressly reference the contract in question.

II. KENTUCKY'S HOSTILITY TO ARBITRATION INVITES GAMESMANSHIP AND FORUM SHOPPING.

By focusing on the formal elements of claims to the exclusion of textual analysis of parties' arbitration agreements, the Kentucky court's restrictive standard improperly encourages gamesmanship by tying the scope-of-arbitrability determination to the formalities of a plaintiff's pleadings,

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[6] See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

which can be creatively drafted to avoid reference to the relevant contract and thus permit plaintiffs to evade arbitration. Rather than ensuring the enforcement of valid arbitration agreements, as Congress mandated in the FAA, the Kentucky standard creates a safe harbor for parties who wish to breach their obligation to arbitrate, authorizing plaintiffs to do precisely what other courts have forbidden: escape arbitration commitments by recasting a dispute in tort or as a statutory violation. See, *e.g.*, *Fazio*, 340 F.3d, at 395 (holding that a party cannot avoid arbitration simply by framing its action in tort); *Fyrnetics*, 293 F.3d, at 1030 (rejecting attempt to avoid arbitration by casting allegations as torts of negligence and misrepresentation). In other words, the decision effectively creates a zone of nonarbitrability for plaintiffs sufficiently sophisticated to plead their claims as statutory or tort claims, rather than directly as contractual violations.

This dangerous erosion of arbitration rights, exacerbated by the implementation of the same standard in Ohio, will encourage forum shopping and generate jurisdictional disputes when parties seeking to escape arbitration obligations target Kentucky and Ohio state courts, while those wishing to enforce arbitration agreements attempt to be heard in federal court or other state courts.[7] The Court should grant the petition to reaffirm that arbitrability depends on the language of parties' agreements, not the forum chosen.

Additionally, by departing from traditional scope analysis in favor of a new contract-reference test, the Kentucky and Ohio decisions will create confusion and uncertainty over the availability of arbitration for statutory and tort claims. For

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[7] South Carolina and Texas courts' implementation of the same arbitrability test makes additional inroads on arbitration rights and further demonstrates the need for review of the arbitrability standard for non-contractual claims. See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

countless contracts containing broad arbitration clauses like respondents' agreements with United, the Kentucky and Ohio decisions will upset parties' settled, and reasonable, expectations that courts will honor their carefully negotiated agreements. By effectively excluding statutory and tort claims from arbitration regardless of the language parties include in their arbitration agreements, the Kentucky and Ohio opinions also introduce unavoidable unpredictability for parties negotiating contracts that reflect broad agreements to arbitrate but rely on Ohio or Kentucky law. Indeed, these decisions may deter parties seeking broad arbitration agreements from entering into contracts governed by Kentucky or Ohio law.

Unless addressed by the Court, the Kentucky and Ohio opinions stand as an open invitation to other courts that have never fully embraced arbitration and now have ammunition to disparately treat motions to compel arbitration of claims other than breaches of contract. This trend dangerously threatens the FAA's arbitral protections and the strong national policy favoring arbitration in two significant respects. First, it will undermine Congress's primary goal of permitting parties to avoid litigation by honoring their agreements not to litigate certain—or all—disputes between them. See, *e.g.*, *Southland*, 465 U.S., at 7 (noting that one party's avoidance of arbitration may lead to protracted litigation, "one of the very risks the parties, by contracting for arbitration, sought to eliminate"). Second, these opinions, if unreviewed, will signal that no consequences lie for a court that egregiously deviates from Congress's clearly expressed will in enacting the FAA. See *supra* Part I.A.

Because the Kentucky and Ohio courts' arbitrability standard undermines the national policy favoring arbitration, dramatically departs from established federal precedent, and eviscerates parties' contractual rights while also establishing an incentive for litigants to use the Kentucky and Ohio courts

in a manner inconsistent with the FAA, the Court should grant the petition and determine whether statutory claims must be arbitrated only when they reference the underlying contract or whether, consistent with arbitrability principles governing all other categories of claims, courts must compel arbitration when allegations touch matters within the scope of the parties' arbitration agreement.

CONCLUSION

The Court should grant the petition.

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May 16, 2006

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT

[Entered February 19, 2003]

CASE NO. 02-C1-903

ACADEMY OF MEDICINE OF CINCINNATI, *et. al.*

Plaintiffs

v.

AETNA HEALTH, INC., *et. al.*

Defendants

ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND MOTIONS TO DISMISS

This cause came on for hearing before the Court on January 8, 2003, on the following motions:

- Anthem Blue Cross and Blue Shield's Motion to Compel Arbitration, and to Dismiss or Stay Proceedings, Including a Stay of Discovery (Oral Argument Requested);
- Defendant Aetna Health, Inc.'s Motion to Compel Arbitration and to Stay the Action Pending Arbitration and Motion to Stay Discovery (Oral Argument Requested);
- Humana Health Plan of Ohio, Inc.'s Motion to Compel Arbitration, and to Stay Discovery Pending Resolution of the Arbitration Issue and Motion to Dismiss;

- United Healthcare of Ohio, Inc.'s Motion to Compel Arbitration and to Dismiss or Stay Proceedings, Including Discovery (Oral Argument Requested); and
- Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery (Oral Argument Requested).

Collectively, the foregoing motions are referred to herein as "Defendants' Motions."

Having fully considered the memoranda filed by counsel for the parties relating to Defendants' Motions, and the arguments of counsel, this Court FINDS that:

All of the Defendants' Motions are not well taken and are therefore OVERRULED.

A. Defendants' Motions to Compel Arbitration and Motions to Dismiss or Stay Proceedings, Including Discovery.

Plaintiffs Academy of Medicine of Cincinnati, A. Lee Greiner, M.D., Raymond Will, M.D., Victor Schmelzer, M.D., Karl S. Ulicny, Jr., M.D., E. Douglas Baldridge, M.D., P. Scott Becker, M.D. and the Northern Kentucky Medical Society (collectively "Plaintiffs") allege in their Amended Complaint that Defendants Aetna Health, Inc., Humana, Inc., Anthem Blue Cross and Blue Shield, and United HealthCare of Ohio (collectively "Defendants") engaged in a conspiracy of price fixing in violation of K.R.S. §367.175, Kentucky's antitrust statute. This dispute does not arise out of or relate to the contracts between Plaintiffs and Defendants. Rather the lawsuit arises out of Defendants' alleged conspiracy to fix the insurance reimbursement rates paid to physicians in Northern Kentucky. In addition, the parties never agreed to arbitrate claims that were independent of any breach of contract.

In this case, arbitration is a matter of contract. Since Plaintiffs are objecting to compelling this lawsuit to arbitration, the court shall not compel an arbitration for a dispute the parties did not agree, in advance, to arbitrate.

B. Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery.

The association Plaintiffs, Academy of Medicine of Cincinnati and the Northern Kentucky Medical Society satisfy the requirements to have standing as party plaintiffs in the case.

The Amended Complaint properly alleges a claim for violation of K.R.S. §367.175, Kentucky's antitrust statute.

This matter is properly brought and the claims alleged arise not from Defendants' performance of services related to the health insurance provider contracts, but rather from Defendants' alleged anticompetitive conduct, and further, the parties did not agree to arbitrate the claims alleged in the Amended Complaint as provided for by K.R.S. §417.045-.240.

The Court further finds that Plaintiffs have properly pled a private right of action for injunctive relief and punitive damages, if proven at trial, and the court does have the authority to grant the injunctive relief requested by Plaintiffs, without having to engage in setting reimbursement rates.

The Court further finds that Defendants' Motion to Stay Discovery is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, THAT:

All of Defendants' Motions are overruled.

Pursuant to Kentucky Civil Rule 12.01, Defendants are required to respond to the Amended Complaint within ten (10) days after the date of the entry of this Order.

IT IS SO ORDERED.

2-18-03
Date

/s/
Joseph F. Bamberger, Judge
Boone Circuit Court

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

[Rendered October 29, 2004]

NO. 2003-CA-000752-MR

ANTHEM HEALTH PLANS OF KENTUCKY, INC., d/b/a
ANTHEM BLUE CROSS AND BLUE SHIELD
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI;
A. LEE GREINER, M.D.; RAYMOND WILL, M.D.;
VICTOR SCHMELZER, M.D.; KARL S. ULICNY, JR.,
M.D.; E. DOUGLAS BALDRIDGE, M.D.;
P. SCOTT BECKER, M.D.; AND NORTHERN
KENTUCKY MEDICAL SOCIETY
Appellees

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

AND:

NO. 2003-CA-000753-MR

UNITED HEALTH CARE OF OHIO, INC.
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI;
A. LEE GREINER, M.D.; RAYMOND WILL, M.D.;
VICTOR SCHMELZER, M.D.; KARL S.ULICNY, JR.,
M.D.; E. DOUGLAS BALDRIDGE, M.D.;
P. SCOTT BECKER, M.D.; AND NORTHERN
KENTUCKY MEDICAL SOCIETY
Appellees

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

AND:

NO. 2003-CA-000754-MR

AETNA HEALTH, INC.

Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI; A. LEE GREINER, M.D.; RAYMOND WILL, M.D.; VICTOR SCHMELZER, M.D.; CARL S. ULICNY, JR., M.D.; E. DOUGLAS BALDRIDGE M.D.; P. SCOTT BECKER, M.D.; AND NORTHERN KENTUCKY MEDICAL SOCIETY

Appellees

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JUDGE; EMBERTON, SENIOR JUDGE[1] AND MILLER, SENIOR JUDGE.[2]

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[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

EMBERTON, SENIOR JUDGE. The appellees are physicians and nonprofit medical societies who filed this action against the appellants, Anthem Health Plans of Kentucky, Inc., United Health Care of Ohio, Inc., Aetna Health, Inc., and Humana Health Plans of Ohio, Inc.,[3] alleging that appellants conspired to fix and lower the insurance reimbursement rates paid to hospitals and physicians in violation of Kentucky's antitrust statute, KRS[4] 367.175. The issue presented is whether the antitrust claims fall within the scope of the arbitration clauses in the contracts between the appellants and appellees. We agree with the trial court that the antitrust claims are not subject to arbitration and affirm its refusal to compel arbitration.

Appellants are the primary providers of group health insurance policies in the Northern Kentucky region. Appellees allege that appellants agreed among themselves to set reimbursement rates paid to doctors and hospitals below the reasonable cost of those services. There can be no dispute that the provider contracts contain clauses stating that "any disputes arising out of or relating to" the provider agreement or "business relationship is to be resolved through arbitration, mediation, or some form of alternative dispute resolution."

Whether an antitrust claim is subject to arbitration is a question of law, and therefore, our standard of review is de novo.[5] Both the federal law, The Federal Arbitration Act codified at 9 U.S.C.A. § 1, et seq., and the state law codified at KRS 417.045, et seq., provide that arbitration is to be favored by the law and "arbitration agreements are enforced

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[3] Humana Health Plans of Ohio, Inc., was dismissed as a party to the appeal.

[4] Kentucky Revised Statutes.

[5] Conseco Finance Servicing Corp. v. Wilder, Ky. App., 47 S.W.3d 335, 340 (2001).

to the standards applied to other contracts."[6] There has been, however, reluctance by the federal and state courts to compel arbitration of antitrust claims.[7] The Florida appellate court summarized the reasoning of these courts:

> The oft-cited reasons underlying these uniform holdings are (1) because a wide range of public interests are affected by private antitrust claims, a "claim under the antitrust laws is not merely a private matter,"; (2) the complexity of the issues and extensiveness of the evidence generally involved in antitrust litigation make resolution of these claims more appropriate for the judicial forum; (3) it is unwise to allow commercial arbitrators, "frequently men drawn for their business expertise . . . to determine these issues of great public interest,"; and (4) because arbitrators are not bound by rules of law and need not give reasons for their rulings, there is no way to insure consistency of interpretation of statutory law or application of arbitration awards.[8] (Citations omitted.)

Despite the precedent refusing to compel arbitration in antitrust claims, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,[9] the Supreme Court held that there is no prohibition to arbitration in cases involving international transactions. Although not overruling federal cases holding otherwise in domestic cases, the court questioned the reason-

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[6] Id. at 339.

[7] See e.g., Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); American Safety Equipment Corp v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968).

[8] Sabates v. International Medical Centers Inc., 450 So.2d 514, 517 (1984).

[9] 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

ing of those courts and opened the door for federal courts to hold that such claims can be arbitrated.[10]

There is no Kentucky case specifically addressing whether such claims can be arbitrated. Although we believe there is soundness in the reasoning that public policy considerations favor judicial resolution, we decide this case on the basis that the antitrust claims alleged are simply outside the scope of the arbitration agreements.

A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated.[11] Where the alleged injurious conduct does not arise from the employment relationship and is independent from it, the courts will not expand the arbitration agreement merely for the purpose of efficiency.[12] The alleged antitrust violations do not arise from or relate to the service provider contracts. This was the result reached by the Ohio court in a proceeding parallel to the case before us alleging the precise antitrust claims against the same parties under Ohio law. We adopt the reasoning of our sister state:

> Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio health care markets such as Dayton, Columbus and Cleveland." In determining whether this claim was within the scope of the arbitration agreements, "[a] proper method of analysis here is to ask [whether this] action could be maintained without reference to the [provider agree-

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[10] See Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994); Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 757 F.Supp. 283 (S.D.N.Y. 1991).

[11] Oakwood Mobile Homes v. Sprowls, Ky., 82 S.W.3d 193, 195 (2002).

[12] Hill v. Hilliard, Ky. App., 945 S.W.2d 948 (1996).

ment] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." (Footnote omitted.)

After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements. To maintain an antitrust claim pursuant to R.C. Chapter 1331, the doctors have to prove that two or more persons came together to illegally concentrate a particular business in the hands of a few for the purpose of controlling prices and that injury resulted from that restraint of trade. (Footnote omitted.) The express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements between the individual doctors and HMOs.

The doctors' allegations in their complaint (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that the anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care dropping by nearly 50 percent and a decline in the quality of health care available for the consumer; and (3) that the HMOs' anticompetitive behavior precipitated a drop in physicians' salaries in the area neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing. . . .[13]

The order denying the motion to compel arbitration is affirmed.

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[13] Academy of Medicine of Cincinnati v. Aetna Health, Inc., 155 Ohio App.3d 310, 312, 800 N.E.2d 1185, 1187 (2003).

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2003-CA-000752-MR

ANTHEM HEALTH PLANS OF KENTUCKY, INC. D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI, ET AL.
Appellees

APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 02-CI-00903

AND

NO. 2003-CA-00753-MR

UNITED HEALTH CARE OF OHIO, INC.
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI, ET AL.
Appellees

APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 02-CI-00903

* * * * * *

ORDER DENYING PETITION FOR REHEARING

BEFORE: GUIDUGLI, JUDGE; EMBERTON AND MILLER, SENIOR JUDGES.[14]

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[14] Senior Judge Thomas D. Emberton and Senior Judge John D. Miller sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

Having considered appellants' motion for leave to cite additional authority in the petition for rehearing filed on November 17, 2004, the Court ORDERS the motion be, and it is hereby, GRANTED.

Having considered the petition for rehearing and the response thereto, the Court ORDERS the petition be, and it is hereby, DENIED.

ENTERED: 1-11-05 /s/
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY

2005-SC-0109-D
(2003-CA-0752 & 2003-CA-0753)

ANTHEM HEALTH PLANS OF KENTUCKY, INC. and
UNITED HEALTHCARE OF OHIO, INC.
Movants

v.

DR. E. DOUGLAS BALDRIDGE, ET AL.
Respondents

BOONE CIRCUIT COURT
NO. 2002-CI-0903

ORDER DENYING DISCRETIONARY REVIEW

The notice, treated as a motion, of Anthem Health Plans of Kentucky, Inc., to dismiss its motion for discretionary review, is granted to the extent that Anthem Health Plans of Kentucky, Inc., is dismissed as a party to the motion for discretionary review.

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED February 15, 2006.

/s/
Chief Justice

KENTUCKY REVISED STATUTES ANNOTATED
TITLE XXIX. COMMERCE AND TRADE
CHAPTER 367. CONSUMER PROTECTION
CONSUMER PROTECTION ACT

§367.175 Other unlawful acts

(1) Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

(3) The sale, delivery, holding, or offering for sale of any self-testing kits designed to tell persons their status concerning human immunodeficiency virus or acquired immunodeficiency syndrome or related disorders, and any advertising of such kits, shall be prohibited.

(4) In addition to any other penalties, violations of this section shall also be a Class C felony.

(2)

No. 05-1466

FILED
JUN 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

NORTHERN KENTUCKY MEDICAL SOCIETY, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Kentucky Court of Appeals properly stated the test common to both Kentucky state law and federal law under the Federal Arbitration Act to determine whether a claim falls within an agreement to arbitrate.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves claims by Respondents The Academy of Medicine of Cincinnati, A. Lee Greiner, M.D., Raymond Will, M.D., Victor Schmelzer, M.D., Karl S. Ulicny, Jr., M.D., E. Douglas Baldridge, M.D., P. Scott Becker, M.D. and The Northern Kentucky Medical Society (collectively "Respondents") that Petitioner United Healthcare of Ohio, Inc. ("Petitioner" or "United Healthcare"), along with Humana, Inc., Anthem Blue Cross and Blue Shield and Aetna Health, Inc., which control approximately 92 percent of greater Cincinnati's HMO enrollment market, (the "Region"), engaged in a conspiracy to maintain artificially low reimbursement rates paid to physicians in the Region in violation of K.R.S. §§367.175, *et. seq.*, Kentucky's antitrust statute.[1] The antitrust claims alleged by Respondents *predate* and have nothing to do with the current provider contracts which relate to the payment of individual claims and contain the arbitration clauses at issue in this appeal.

It is a fundamental tenet of both Kentucky and federal law that a party may not be compelled to submit to arbitration any dispute he has not agreed to so submit. However, that is

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[1] The original complaint also alleged claims against Defendants Humana, Inc., Aetna Health, Inc. and Anthem Blue Cross and Blue Shield. However, each of these parties have settled these claims. As part of those settlements, each insurance company agreed to increase the total annual reimbursements paid to physicians in the Region and undertake other measures to either monitor future negotiations with physician groups and physician organizations in the Region or fund efforts to enhance physician recruitment and retention in the Region.

precisely what Petitioner seeks to have this Court do in seeking a writ of certiorari under the guise that an improper standard of arbitrability has been applied. In support of this argument, Petitioner claims that there is a "growing trend" of state courts concluding that claims are not arbitrable despite broad arbitration clauses; however, the only two decisions referenced by Petitioner are those in this case and its companion case pending in a state court in Ohio.[2] All of the parties in this appeal agree that arbitration is a matter of contract, and the trial court and Kentucky Court of Appeals concluded that Respondents' statutory antitrust claims fall outside of the scope of the arbitration clauses at issue in this litigation. The Kentucky Supreme Court declined to grant discretionary review of the decision of the Kentucky Court of Appeals. Petitioner has not in its argument in support of its petition for a writ of certiorari made any new or compelling arguments which support review by this Court.

This case was filed by Respondents, on behalf of the more than 2,000 physicians in the Region, in June 2002 in Boone Circuit Court in the Commonwealth of Kentucky. The suit alleges that the dominant insurance companies in the Region engaged in anticompetitive behavior, which has had a devastating impact on the availability of quality medical care in the Region. The reimbursement rates paid to doctors in the Region are approximately 30% below the market average paid for the same services in Columbus, Ohio, Indianapolis, Indiana, and Lexington, Kentucky. Petitioner's illegal conduct has resulted in fewer hospitals, fewer physicians, a deficit of health care, a lack of necessary trauma centers, fewer

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[2] *United Healthcare of Ohio, Inc. v. Academy of Medicine of Cincinnati*, Case No. 05-1465, pending in this Court on a petition for a writ of certiorari to the Supreme Court of Ohio.

innovative procedures available to patients in the Region, and a decrease in physician pay by an average of nearly 30%. In fact, in the areas of reimbursement rates for new patients, established patients, inpatient and outpatient consultations, hospital admissions, subsequent hospital care visits and hospital discharges, in the Region not only ranked last, but *below* the market average.

Petitioner's actions have also caused a decrease in the number of hospitals in the Region, despite an increasing population in the Region. At the same time, Petitioner's profits have grown substantially. As Petitioner continued to engage in anticompetitive behavior, its profits grew while the number of doctors and quality of care declined in the Region. For example, in the first half of 2001, United Healthcare's earnings were up 25% to $435 million on revenues of $11.5 billion.

Despite the fact that Respondents' claims arise independently of the provider agreements entered into between some Respondent physicians in the Region and Petitioner, shortly after Respondents filed their Complaint, each Defendant filed separate motions to compel the antitrust claims to arbitration. Petitioner's arguments have been rejected at each level below. Accordingly, this Court should deny Petitioner's request for a writ as it does not merit review.

REASONS FOR DENYING THE PETITION

This matter does not involve novel or unresolved issues regarding the test courts should apply under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to determine if a claim is subject to arbitration. Nor does this matter involve a split among any courts regarding the appropriate

test to apply under the FAA. Rather, this matter merely involves traditional principles of contract interpretation. Petitioner does not like the decisions rendered by the two Kentucky courts and separately by the three Ohio courts which determined that the claims did not fall within the arbitration provisions. However, an alleged misapplication of the test, properly set forth by the Kentucky Court of Appeals to the facts and contract provision at issue in this case, is not a compelling reason to grant certiorari. *See* Sup. Ct. R. 10.

I. Kentucky Courts Have Properly Stated the Rules of Law Applicable Under Federal and Kentucky State Law to Determine if a Claim is Within an Agreement to Arbitrate.

A. There is No Conflict Between the Kentucky Court of Appeals and the United States Courts of Appeals Regarding the Appropriate Principles of Law Applicable Under Federal Law to Determine If a Claim is Arbitrable.

The Question Presented by Petitioner does not accurately reflect the Kentucky Court of Appeals' statement or application of the test, common to both Kentucky state courts and federal courts, for determining whether a claim falls within an agreement to arbitrate. Contrary to Petitioner's suggestion, the Kentucky Court of Appeals accurately stated the rule of law applicable under both Kentucky law and the FAA for determining whether a claim is arbitrable.

Petitioners distort the holdings below by asserting that the test adopted by the Kentucky Court of Appeals for determining if a claim is within the scope of the parties' arbitration agreement "considers only whether the elements of [the statutory and tort] claims reference the parties'

contract." (Petition for Writ of Certiorari, at p. i.) Rather, the Kentucky Court of Appeals correctly stated the relevant rules of law that guide determinations of arbitrability. *Anthem Health Plans of Ky., Inc. v. Acad. of Medicine of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR (Ky. App. Oct. 29, 2004), review denied *Anthem Health Plans of Ky., Inc. v. Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006).

The Kentucky Court of Appeals first recognized that both the FAA and state law provide that arbitration is to be favored by the law, and arbitration agreements are to be enforced in accordance with the same standards applied to other contracts. *Id.* at 1-2. The court then properly set forth the fundamental and paramount rule of law applicable to determinations of arbitrability under both the FAA and Kentucky state law: "A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated." *Id.* at 3. This fundamental rule of law is the same one adopted by this Court in *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986), for determining the arbitrability of claims, and it remains the law today.

Kentucky courts have consistently and properly set forth the rules of law applicable to determinations of arbitrability. Kentucky's Uniform Arbitration Act ("UAA") embodies the same principles, and largely mirrors, the FAA. KRS §§ 417.045, *et seq.*; *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky. 2004). Application of the Kentucky UAA and the FAA by Kentucky courts is consistent with federal law, and advances the pro-arbitration goals of both the state and federal Acts. *See, e.g., Louisville Peterbilt, Inc.*, 132 S.W.3d at 854-55; *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 339 (Ky.App. 2001); *Hill v. Hilliard*, 945 S.W.2d 948, 951 (Ky.App. 1996); *Valley*

Const. Co., Inc. v. Perry Host Management Co., Inc., 796 S.W.2d 365, 366, 367 (Ky.App. 1990).

Like the Kentucky Court of Appeals in this case, relying upon federal law, Kentucky courts have repeatedly recognized that arbitration agreements are a matter of contract, and are interpreted according to state law. *See, e.g., Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193, 195 (Ky. 2002) (citing *AT & T Technologies, Inc.*, 475 U.S. 643, and *Perry v. Thomas*, 482 U.S. 483 (1987)). Consistent with this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), Kentucky courts recognize that the "first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate that dispute." *Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 195. (quoting *Mitsubishi*, 473 U.S. at 626).

Further, Kentucky courts have specifically recognized that statutory claims can properly be compelled to arbitration to the same extent as other disputes as long as there is no legal constraint to arbitration, such as a constraint set forth in the statute or legislative history. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194; *Hill*, 945 S.W.2d at 951; *Conseco Finance Servicing Corp.*, 47 S.W.3d at 339. The Kentucky Court of Appeals specifically recognized in this case that this Court had opened the door for federal courts to hold that domestic anti-trust claims could be arbitrated in *Mitsubishi*. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 2-3.

There is no dispute between Kentucky courts and the federal Courts of Appeals regarding the applicability of these principles to questions of arbitrability under federal law. *See, e.g., Air Line Pilots Ass'n v. Federal Express Corp.*, 402

F.3d 1245, 1248 (D.C. Cir. 2005); *Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital*, 415 F.3d 145, 149 (1st Cir. 2005); *Alliance Bernstein Inv. Research and Management, Inc. v. Schaffran*, 445 F.3d 121, 125 (2d Cir. 2006); *Medtronic AVE Inc. v. Cordis Corp.*, 100 Fed.Appx. 865, 866-67 (3d Cir. 2004); *East Coast Hockey League, Inc. v. Professional Hockey Players Ass'n*, 322 F.3d 311, 314 (4th Cir. 2003); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 752 (5th Cir. 1995); *Cleveland Elec. Illuminating Co. v. Utility Workers Union of America*, 440 F.3d 809, 813 (6th Cir. 2006); *Local Union 1393 Intern. Broth. of Elec. Workers, AFL-CIO v. Utilities Dist. of Western Indiana Rural Elec. Membership Co-op.*, 167 F.3d 1181, 1183-84 (7th Cir. 1999); *Kansas City Southern Transport Co., Inc. v. Teamsters Local Union #41*, 126 F.3d 1059, 1067 (8th Cir. 1997); *Carpenters 46 Northern California Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410, 414 (9th Cir. 1996); *Oil, Chemical and Atomic Workers Intern. Union Local 5-391 v. Conoco, Inc.*, 64 Fed.Appx. 178, 181 (10th Cir. 2003); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 712 (11th Cir. 1987).

Since the Kentucky Court of Appeals properly stated the applicable rules of law under federal law, this Court should deny Petitioner's request for a writ of certiorari.

B. The Method of Analysis Approved by the Kentucky Court of Appeals to Determine Whether Parties Agreed to Submit a Dispute to Arbitration is Consistent With Federal Law

The Kentucky Court of Appeals in applying the appropriate analysis concluded that the parties had not agreed to arbitrate this dispute, and held that "the antitrust claims alleged are simply outside the scope of the arbitration

agreements." *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 3. In doing so, the Kentucky Court of Appeals adopted the reasoning of the Ohio appellate court who had considered the identical claim, facts, and arbitration agreement, and whose decision was ultimately adopted by the Ohio Supreme Court. *Id.* at 3; *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 800 N.E.2d 1185, 1187 (Ohio Ct. App. 2003); *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 842 N.E.2d 488, 494 (Ohio 2006).

In analyzing the scope of the arbitration agreement, the Ohio Court of Appeals adopted the test enunciated by the Sixth Circuit Court of Appeals in *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir. 2003), and stated:

> In determining whether this claim was within the scope of the arbitration agreements, "[a] proper method of analysis here is to ask [whether this] action could be maintained without reference to the [provider agreement] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." *Academy of Medicine of Cincinnati*, 800 N.E.2d at 1187 (internal citation omitted).

The Kentucky Court of Appeals adopted this reasoning. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 3-4.

Petitioner's attack of the Kentucky Court of Appeal's decision is largely based upon a misreading of the decision. First, in an effort to characterize the opinion as constrictive and hostile to arbitration, Petitioner misstates the test approved by the Kentucky appellate court by asserting that the court "insist[s] that elements of claims reference parties'

underlying contracts as a prerequisite to compelling arbitration under the FAA." (Petition for Writ of Certiorari, at p. 9.) In reality, the Kentucky Court of Appeals merely stated that when determining whether a cause of action is within the scope of an arbitration agreement, a proper method of analysis is to ask if the action could be maintained without reference to the agreement or relationship at issue. If so, the Kentucky Court of Appeals does not state that a court must then find the action outside the arbitration agreement. Rather, it states that the action is *likely* outside the scope. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 3-4. In other words, the test is helpful in analyzing the scope of the arbitration clause, but does not establish a per se rule. *See Id.* The court, therefore, approved the use of this method of analysis, but did not require courts to do so, preclude other methods of analysis, or insist that the elements of the claim reference the contract to be within the scope of the arbitration agreement.

Nor did the Kentucky Court of Appeals create a distinct test applicable to statutory or tort claims, or render non-arbitrable all tort and statutory causes of action, as Petitioner suggests. In fact, the opposite is true. The court recognized that this Court had opened the door to the arbitrability of domestic antitrust claims in *Mitsubishi*. *Id.* at pp. 2-3. Other Kentucky courts have expressly found that statutory claims could be compelled to arbitration. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194; *Hill*, 945 S.W.2d at 951; *Conseco Finance Servicing Corp.*, 47 S.W.3d at 339. The Kentucky Court of Appeals did not reach the question of whether there were any legal constraints to arbitrating Kentucky state law antitrust claims because it determined, based upon traditional contract interpretation principles, that the claim was simply outside the scope of the arbitration

clause. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at p. 3.

In adopting the reasoning of the Ohio appellate court, the Kentucky Court of Appeals recognized that the proper focus of any inquiry is the substantive allegations of the complaint, rather than the labels attached to the causes of action. *See Id.* at pp. 3-4. The "contract reference" test approved by the Kentucky Court of Appeals is one method that can be used to analyze the substantive factual allegations. The argument advanced by Petitioner erroneously assumes that only one method of analysis, *i.e.*, the "touch matters" or "contract reference" method, may properly be applied to the complaint's factual allegations by a court when determining the scope of an agreement to arbitrate. However, asking whether the allegations underlying the claims "touch matters" covered by the arbitration agreement is no different than asking whether a claim can be "maintained without reference to the contract or relationship." Both questions seek to determine the scope of the arbitration clause by analyzing whether the asserted claims and facts underlying those claims arise independently of the agreement to arbitrate. Both focus upon the factual allegations, rather than the labels given to the causes of action. As demonstrated by the Sixth Circuit in *Fazio*, the tests are not mutually exclusive, but, rather, complement each other.

> District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement. *Stout*, 228 F.3d at 714. **A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration**

agreement. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir.1998) (applying Texas arbitration law under a choice of law provision). Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1030 (7th Cir.2002). **Even real torts can be covered by arbitration clauses "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]."** *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987). We are, however, aware of the Supreme Court's warning against "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945, 115 S.Ct. 1920. *Fazio*, 340 F.3d at 395 (emphasis added); *see also Deputy v. Lehman Brothers Inc.*, 2004 WL 3770574, 4 (E.D.Wis. 2004) (adopting test set forth in *Fazio*); *see also Service Corp. Intern. v. Lopez* , 162 S.W.3d 801, 810 (Tex. App. 2005) (demonstrating further the complementary nature of the "touch matters" and "contract reference" approaches).

Neither this Court, nor any other Court of Appeals, has indicated that these methods of analysis are mutually exclusive, that the "touch matters" test is the exclusive method of analysis, or that the "contract reference" method is inappropriate. Contrary to Petitioner's suggestion, this Court did not establish the "touch matters" test as the exclusive method for analyzing the scope of an arbitration clause in *Mitsubishi.*, 473 U.S. at 625 fn.13. Rather, this Court used the phrase "touch matters" in a footnote while examining the claim at issue in *Mitsubishi*:

> Soler does suggest that, because the title of the clause referred only to "certain matters," App. 52, and the clause itself specifically referred only to "Articles I-B through V," *ibid.*, it should be read narrowly to exclude the statutory claims. Soler ignores the inclusion within those "certain matters" of "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability. *Id.*

If this Court's footnote were given the broad reach urged by Petitioner, the traditional principles of contract interpretation that this Court has instructed courts to apply, *First Options of Chicago, Inc v. Kaplan,* 514 U.S. 938, 944 (1995), *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60-63 (1995), would be effectively eviscerated. *See Alticor, Inc. v. National Union Fire Ins. Co.*, 411 F.3d 669, 673 (6th Cir. 2005) (rejecting appellant's reliance upon the United States Supreme Court's footnote in *Mitsubishi* to argue that dispute should be compelled to arbitration because it "touches matters" covered by arbitration agreement, stating that appellant "reads this passing comment out of context, and we do not believe the words have the broad impact [appellant] would give them"). Indeed, Petitioner cites no authority which states that only the "touch matters" method of analysis is correct or that the "contract reference" method is incorrect.

Most important, the Kentucky Court of Appeal's approach is consistent with the principles set forth under federal law and advances the federal policy favoring arbitration where appropriate. Consistent with directives from this Court and federal Courts of Appeals, by adopting the reasoning of the Ohio appellate court, the Kentucky Court of Appeals properly recognized that determinations of arbitrability must be based upon the factual allegations in the complaint, rather than the legal theories presented. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 3-4. There is no dispute among the Kentucky Court of Appeals and the federal Courts of Appeals on this point.

Petitioner mischaracterizes the Kentucky Court of Appeals' holding by suggesting that the test is based upon artful pleading rather than the underlying factual allegations. (Petition for Writ of Certiorari, at p. 14.) The test approved by the court is not whether the *complaint* references the arbitration agreement, as Petitioner states. (*Id.*) Rather, it is whether "the action could be maintained without reference to the contract or relationship at issue." *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 3-4. Consistent with federal law, the test appropriately looks to the substance of the factual allegations rather than the legal theories presented.

II. The Kentucky Court of Appeals Correctly Applied the Test of Arbitrability to the Agreements, Facts, and Claims Involved in this Case

A. Arbitrability is a Matter of Contract, and the Kentucky Courts Applied Traditional Contract Principles in Making Their Determination

Petitioner's emphasis upon the federal policy favoring arbitration loses sight of the fact that arbitrability is a matter of contract interpretation, and a fundamental tenet of federal law is that a party cannot be compelled to submit to arbitration any dispute which he has not agreed to so submit. *AT&T Technologies, Inc.*, 475 U.S. at 648-49. As this Court has recognized, "[t]he overarching issue is whether the parties agreed to arbitrate the issue." *Mitsubishi,* 473 U.S. at 626; *see also Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at p. 3 ("A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated.") Although federal law favors arbitration, the intent of the contracting parties is paramount and can trump the FAA's policy in favor of arbitration.

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." . . . Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. *Id.*, at 626, 105 S.Ct. 3346.

> While ambiguities in the language of the agreement should be resolved in favor of arbitration, . . . we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002) (some internal citations omitted); *see also Mastrobuono*, 514 U.S. at 57.

Further, simply because parties have a contract relating to certain matters does not mean that every dispute that arises between them will be subject to arbitration. The FAA places arbitration agreements on equal footing with other contracts, but not greater footing.

> Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), and nothing beats normal rules of contract law to determine what the parties' agreement entails. There is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device. *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003) (holding that arbitration agreement between trusts and clearing

broker did not require arbitration of trustee's fraud claim against broker).

When deciding whether the parties agreed to arbitrate a dispute, courts are to apply traditional state-law principles that govern the formation and interpretation of contracts. *First Options of Chicago, Inc,* 514 U.S. at 944; *Mastrobuono,* 514 U.S. at 60-63. Because arbitration is a matter of contract, it goes without saying that parties to a lawsuit who were not parties to the arbitration agreement cannot be compelled to arbitrate their claims. *Waffle House, Inc.*, 534 U.S. at 294 (stating that "[i]t goes without saying that a contract cannot bind a nonparty," and holding that claim brought by EEOC, a non-party to the contract containing the arbitration provision, on behalf of employees who were parties to the contract, was not subject to arbitration); *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 247 (5th Cir. 1998) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)) ("Unless required by statute, a person who is not a party to a pre-dispute contract to arbitrate cannot be compelled to submit a dispute to arbitration."). Two of the plaintiffs in this action are medical societies. Because the medical societies were not signatories to the agreements containing the arbitration clauses, their claims are not subject to the FAA and cannot be compelled to arbitration or stayed.

Similarly, the Kentucky courts correctly determined that the physicians' claims should not be compelled to arbitration because the state law anti-trust claim alleged is not within the scope of the arbitration agreement. "[I]t is the language of the contract that defines the scope of disputes subject to arbitration." *Waffle House, Inc.*, 534 U.S. at 289. The Kentucky and Ohio courts who reviewed the arbitration agreements at issue examined the factual allegations and the

language of the agreements and applied traditional contract principles. Every one of the courts determined that the state anti-trust claim alleged by Respondents was not within the scope of the arbitration agreement.

The provider agreements which contained the arbitration provision were entered into between individual physicians and Petitioner United Healthcare (and the three other insurance companies who were named as defendants and who have since settled their claims). The agreements established a fee schedule for reimbursement by Petitioner of the physicians for certain medical procedures. The arbitration provision requires the parties to the agreement to arbitrate disputes relating to their "business relationship." The dispute at issue here, however, centers on whether Petitioner illegally conspired or colluded with other insurance companies to set reimbursement rates in the region lower than the prevailing rates in comparable health care markets.

The Kentucky Court of Appeals recognized that both Kentucky and federal law favors arbitration to settle disputes. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 1-2. However, it also recognized that arbitrability is a matter of contract, and affirmed the trial court's determination that the dispute was not within the scope of the agreement to arbitrate. *Id.* at p. 3. Adopting the reasoning of the Ohio appellate court, the Kentucky Court of Appeals found:

> Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio helath care markets such as Dayton, Columbus and Cleveland."

> ***
>
> After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements.
>
> ***
>
> The doctors' allegations in their complaint (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that the anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care dropping by nearly 50 percent and a decline in the quality of health care available to the consumer; and (3) that the HMOs' anticompetitive behavior precipitated a drop in physicians' salaries in the area neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing . . . . *Id.* at pp. 3-4 (quoting *Academy of Medicine of Cincinnati*, 800 N.E.2d at 1187).

Simply because the physicians and insurance companies agreed to a fee schedule and agreed to arbitrate disputes concerning their "business relationship" does not mean that the physicians agreed to arbitrate disputes alleging an illegal conspiracy among insurance companies with regard to artificial capping of reimbursement rates, to which Respondents have been victims. This is not a dispute about the business relationship between the physicians and Petitioner. The dispute concerns the illegal agreement among

insurance companies in the Region. The allegations of an agreement among insurance companies to fix prices arose out of the conduct of the insurance companies before the provider agreements containing the arbitration provision were even executed. The anti-competitive behavior alleged by Respondents predates and has nothing to do with the current provider contracts which relate to the payment of individual claims and contain the arbitration clauses at issue in this appeal. The anti-trust claims arise independently of the provider agreements.

There's a reason every court in Kentucky and Ohio in this case who has considered this issue has determined that the dispute is not within the scope of arbitration clause, and it is not because the courts are hostile to arbitration as Petitioner asserts. In fact, the Kentucky Court of Appeals expressly stated that both Kentucky and federal courts favor arbitration. *Id.* at pp. 1-2. Rather, it is because, after examining the specific factual allegations of the complaint and the language of the arbitration clause at issue, the courts have applied standard contract principles and determined that this dispute is not within the scope of the arbitration clauses. The result is the same whether a court applies the "contract reference" or "touch matters" test.

Petitioner is wrong to rely primarily on the favored status of arbitration as the basis to obtain this Court's review of the Kentucky Court of Appeals' decision. The Kentucky Court of Appeals and trial court correctly interpreted the contract provision at issue in light of the factual allegations. The medical societies who were not parties to the arbitration agreement cannot be compelled to arbitrate their claims. Further, applying traditional principles of contract interpretation, this dispute is simply not within the scope of the arbitration agreement.

B. The Determination of Whether An Anti-Trust Claim is Arbitrable Depends Upon the Specific Facts and Contract Language At Issue, and Neither the United States Supreme Court, Nor the Kentucky Court of Appeals, Has Made Anti-Trust Claims Per Se Arbitrable

The determination of whether a claim is within the scope of an arbitration agreement is driven by an analysis of the factual allegations made in the complaint and the court's application of state law principles of contract interpretation. Because the determination is dependent upon the specific facts alleged and the specific contract language at issue, it is impossible to create per se rules with respect to arbitrability. The facts and contract language will differ in every case, creating the likelihood of differing results.

In *Mitsubishi,* this Court considered the arbitrability of a federal anti-trust claim in the context of an international transaction. *Mitsubishi*, 473 U.S. 614. The petitioner relied upon both the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is seeking to compel arbitration of the dispute. *Id.* at 614. In its decision, this Court did not undertake its own analysis of the scope of the arbitration language at issue. Plaintiff had not appealed the lower court's determination that the antitrust claim implicated the arbitration agreement. Rather, the Court considered whether the federal anti-trust claim was nonarbitrable due to legal constraints or policy considerations even though the parties had agreed to arbitrate such claims. *Id.* at 628-29.

This Court first held that there was no reason to carve statutory claims out as inappropriate for arbitration. *Id.* at 626. They are subject to the same rules of contract

interpretation and arbitrability as any other claim, unless the legislative intent or public policy considerations demonstrate some legal constraint foreclosing the arbitration of a particular statutory claim. The Court then determined that the federal anti-trust claim at issue in *Mitsubishi* was arbitrable, basing its decision almost entirely upon the international nature of the transaction at issue, and recognizing that a different result may occur in a domestic context.

> We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (1968). Notwithstanding the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make ··· antitrust claims ··· inappropriate for arbitration." *Id.*, at 827-828. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), *we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.* *Id.* at 628-29 (emphasis added).

This Court, therefore, did not hold that all anti-trust claims are arbitrable. Rather, it merely held that statutory claims *could* be subject to arbitration if the parties agreed to submit statutory claims to arbitration, and that the international nature of the dispute before it made arbitration particularly appropriate. In other words, the Court held that there was no legal constraint or policy consideration applicable to the federal anti-trust claim that would render it non-arbitrable despite the parties' agreement to arbitrate the claim. The factual allegations and particular contract language at issue in each dispute still must be analyzed to determine if the parties agreed to arbitrate the specific statutory or tort claim alleged.

The Kentucky Court of Appeals recognized the holding of *Mitsubishi* in its analysis. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 2-3. It recognized that this Court had held that "there is no prohibition to arbitration in cases involving international transactions" and that this Court had also "opened the door" for federal courts to hold that domestic antitrust claims could be arbitrated as well. *Id.* The Kentucky Court of Appeals did not reach the issue of whether there was any legal constraint or policy consideration under Kentucky law that would prohibit the arbitration of state law antitrust claims because there was no need to do so. *Id.* at p. 3. However, the Kentucky Court of Appeals recognized that arbitration agreements are to be enforced like any other contract, *Id.* at pp. 1-2, and other Kentucky courts have specifically found that other Kentucky statutory claims may be compelled to arbitration. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194; *Hill*, 945 S.W.2d at 951; *Conseco Finance Servicing Corp.*, 47 S.W.3d at 339. The Kentucky Court of Appeals analyzed the scope of the arbitration clause at issue here and determined that the particular claim alleged fell

outside its scope. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 3.

Kentucky courts have not ruled upon the issue of whether there is a legal constraint or policy consideration under Kentucky law that would prohibit the arbitration of Kentucky antitrust claims. Respondents do not assert, and the Kentucky Court of Appeals did not hold, that all anti-trust claims are non-arbitrable. Rather, every court that has considered the arbitration agreement at issue has concluded that the anti-trust claim alleged in this case is not subject to the arbitration agreement based upon their interpretation and analysis of the specific contract language and factual allegations of the complaint.

Differing results among courts that have considered the arbitrability of anti-trust claims are inevitable because of the highly factual nature of such an inquiry. While it may be true that courts who have considered the issue have recognized that there is generally no legal constraint or policy consideration that would render anti-trust claims nonarbitrable even where the parties agreed to arbitrate such claims, such a determination must be made by each state or their courts as to state law statutory claims. The determination requires an analysis of the state's case law and legislative history relative to the statute under which the claim is being made. Further, an analysis of the particular factual allegations and contract language in each case is still required to determine whether the parties agreed to arbitrate the particular claim and the scope of the arbitration agreement. The result of the courts' analyses of the varying factual situations and varying contract language has produced different results.

For example, in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995), the court concluded that although the arbitration clause at issue encompassed antitrust claims generally, some of the antitrust causes of action Coors Brewing Company brought against Molson Breweries of Canada Limited were outside the scope of the contract between the two companies. *Id.* at 1516-17. The court held that Coors was entitled to litigate the antitrust claims not related to the licensing agreement containing the arbitration provision "just as anyone else with standing may." *Id.* at 1517. The court recognized that *Mitsubishi* provided no support for categorically concluding that all antitrust claims must go to arbitration. *See Id.* at 1516.

> Although *Mitsubishi* allowed parties to a contract to compel the arbitration of their antitrust disputes, it did not proclaim that all disputes between parties who include an arbitration clause in their contracts are subject to arbitration. A dispute within the scope of the contract is still a condition precedent to the involuntary arbitration of antitrust claims. . . A contrary reading of *Mitsubishi* not only ignores the facts of that case, but also could lead to absurd results. For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship. Similarly, in this case, Coors is entitled to litigate its antitrust claims regarding the Miller-Molson relationship in a public forum so long

as the claims are not related to the licensing agreement. *Id.* at 1516 (internal citation omitted).

Other federal and state courts have similarly found that antitrust claims were not within the scope of the arbitration agreement at issue. *See, e.g., AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999); *Armco Steel Co., L.P. v. CSX Corp.*, 790 F.Supp. 311, 317 (D.D.C. 1991); *Swensen's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1350 (8th Cir. 1991). Likewise, courts have determined that specific statutory and tort claims were outside the scope of the arbitration agreements being litigated. *See, e.g., Aiken v. World Fin. Corp. of S.C.*, 623 S.E.2d 873, 876 (S.C. App. 2005) (holding that tort claims for intentional infliction of emotional distress, negligence, and unfair trade practices were not within scope of arbitration agreement relating to loan agreement because the tort claims were independent of the loan agreement); *Loy v. Harter*, 128 S.W.3d 397, 405 (Tex.App. 2004) (holding that tort claim for breach of fiduciary duty was not covered by arbitration provision in employment agreement where claim was independent of employment relationship and could be maintained without reference to the employment agreement); *Cohen v. PaineWebber, Inc.*, 2002 Ohio App. LEXIS 161 (Ohio App. 1st Dist. 2002) (holding that arbitration provision in investment account agreement did not cover torts alleging theft), appeal not allowed 95 Ohio St.3d 1460, *cert. denied* 537 U.S. 974; *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998) (holding that Lanham Act false advertising claim was not within the scope of the arbitration agreement).

Petitioner relies upon the Second Circuit Court of Appeals' decision in *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 167 (2nd Cir. 2004), for its assertion that a

conflict exists between that court and the Kentucky Court of Appeals. However, the similarities between the cases end with the fact that both involve anti-trust claims. The language of the anti-trust provision in *JLM*, which provided that "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter" are subject to arbitration, is substantially different than the arbitration agreement at issue here which requires parties to arbitrate disputes relating to their "business relationship." *See id.* at 172. Further, *JLM* arose in an international, rather than domestic context. Interestingly, the *JLM* court noted that it had previously cautioned against use of the "touch matters" test propounded by Petitioner, finding that " touch matters' and like phrases do not 'yield[ ] a principled way of ··· deciding whether ··· claims should be sent to arbitration.'" *Id.* at 172-73 (internal citation omitted).

JLM establishes nothing more than what Respondents have already stated – whether a particular statutory or anti-trust claim is arbitrable depends upon the specific factual allegations and contract language at issue in each case. Here, the Kentucky and Ohio courts who have considered Respondents' factual allegations and the language of the arbitration agreement have uniformly held that Respondents' anti-trust claim does not fall within the scope of the arbitration provision.

III. Neither The Kentucky Court of Appeals' Alleged Misapplication of the Rule of Law, Nor Petitioner's Dissatisfaction with the Result of the Kentucky Courts' Application of the Test, Are Compelling Reasons to Grant Certiorari

Petitioner's argument is, in essence, a complaint that the Kentucky Court of Appeals reached the wrong result in its application of the rules of arbitrability to the factual

allegations and contract language at issue in this case. Petitioner does not like the result that every court in Kentucky and Ohio who has considered these factual allegations and contract language has reached. However, as demonstrated above, the Kentucky Court of Appeals properly stated the applicable rules of law, and its alleged misapplication of these rules of law is not a compelling reason to grant certiorari.

The determination of whether a claim is within the scope of an agreement to arbitrate is a highly factual analysis. The result is driven by the factual allegations of the complaint and the intent of the parties to the contract containing the arbitration provision. As explained above, there will necessarily be differing results upon application of these rules of law due to the differing factual scenarios presented by each case. Petitioner asks this Court to disregard the findings made by the Kentucky courts, and conduct a *de novo* review of the courts' application of the arbitrability rules to the factual allegations and contract language at issue. Such is not the role of this Court. Because Petitioner presents no question of great federal importance, its petition for a writ of certiorari should be denied.

IV. The Court Has Already Determined That The Question Presented by Petitioner Does Not Merit Review.

Petitioner seeks to have this Court review the findings of the trial court and the Kentucky Court of Appeals which applied federal case law when reviewing the arbitrability of claims and arrived at a decision which is opposed by Petitioner. This precise issue was considered and determined to not merit review by this Court in *UBS PaineWebber, Inc. v. Cohen*, 537 U.S. 974 (2002), when it denied certiorari to the Sixth Circuit case which also correctly applied federal law

to certain claims and found by them to fall outside the scope of those contemplated by an arbitration provision among the parties.

In *Cohen v. PaineWebber, Inc.*, 2002 Ohio App. LEXIS 161 (Ohio App. 1st Dist. 2002), a customer of investment firm PaineWebber agreed to arbitrate "any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement." *Id.* at 3. The customer's estate alleged that the defendants, including PaineWebber, had stolen money from this account. *Id.* at 3-4. The trial court denied PaineWebber's motion to compel arbitration, and the Court of Appeals affirmed, on the ground that, at the time the plaintiff entered into the agreement, the parties never contemplated that the arbitration clause would cover theft. *Id.* at 4-6. The court explained:

A contract requires a "meeting of the minds" as to the terms contained within. At the time that the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time that they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. Matters more likely to have been contemplated by both parties would have involved questions of whether a particular transaction was authorized or whether there was any miscalculation in the sum of money contained in the account. Here, the claims filed by Cohen alleged that [defendants] had engaged in conduct beyond the scope of the brokerage agreement .... Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent

concealment, were not subject to the arbitration provision. *Id.* at 9.

The Ohio Court of Appeals' reasoning in *Cohen*, which was affirmed by the Ohio Supreme Court, and also denied certiorari review by this Court, is directly applicable here. Respondents agreed to arbitrate disputes arising out of or relating to its contracts with Petitioner – *i.e.*, breach of contract claims. The parties never contemplated the prospect that Petitioner would unlawfully conspire with other health insurance companies to fix reimbursement rates, anymore than the customer of PaineWebber contemplated the prospect of theft of funds from his account. If unlawful conduct – whether a conspiracy to fix rates or theft – had been contemplated as part of the parties' "meeting of the minds," that would have been contrary to long established public policy (which condemns illegal price-fixing no less than it condemns theft). Thus, Petitioner here, like PaineWebber in *Cohen,* engaged in conduct beyond the scope of the various contracts between the parties, and, as a matter of law, the Kentucky courts found the claims of unlawful price-fixing not subject to the arbitration provision.

The decisions of the Boone County Circuit Court and the Kentucky Court of Appeals correctly applied federal standards of arbitrability in reaching the conclusion that the antitrust claims of Respondents fall outside the scope of the arbitration provisions at issue in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 05-1466

IN THE

Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

NORTHERN KENTUCKY MEDICAL SOCIETY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to resolve the conflict between the touch-matters arbitrability test used in most jurisdictions and the restrictive contract-reference test authorized by the Kentucky Court of Appeals. By conceding that two tests exist and by failing to deny the inevitability of forum shopping and gamesmanship resulting from Kentucky's contract-reference test, respondents confirm the need for the Court's review of the proper arbitrability standard for statutory and tort claims.

Although respondents attempt to marginalize the significance of the contract-reference test by recharacterizing it as a mere tool for factual analysis of allegations in a complaint,

they cannot deny that the contract-reference test conclusively determines whether a claim will be arbitrable. Nor can they demonstrate how, as they contend, the two tests can coexist in a complementary manner when the contract-reference test has a critically different focus than the touch-matters analysis performed by most courts. Specifically, the touch-matters standard focuses on the language of parties' arbitration agreements and faithfully carries out congressional intent to ensure their enforceability, whereas the contract-reference test focuses on the litigation claims themselves and never seriously looks at the terms to which the parties agreed.

These fundamentally disparate approaches yield strikingly different results when, as in this case, the parties' arbitration agreement is broad, encompassing "any disputes about their business relationship." If a court begins, under the touch-matters test, with that language, the relevant arbitrability inquiry is whether a dispute touches, in any way, the parties' business relationship. Price-fixing allegations based on contractually established rates unquestionably do. But if, as in Kentucky, a court begins its inquiry by asking whether the claims reference the contract, the scope of the parties' arbitration agreement becomes immaterial. Neither the FAA nor this Court's arbitrability directives permit that result. By ignoring the language of the parties' agreement and inquiring, instead, whether the asserted claims reference the underlying contract, the contract-reference test frustrates congressional intent by permitting courts to unjustifiably restrict the enforceability of arbitration agreements and by enabling parties to use artful pleading to escape their arbitration obligations. The Court should grant the petition to resolve the conflict over the proper arbitrability standard for statutory and tort claims created by the contract-reference test—which has been applied not only by Kentucky, but by Ohio (presented in companion petition No. 05-1465) and by Texas and South Carolina as well.

ARGUMENT

I. RESPONDENTS CONCEDE THAT COURTS DO NOT EMPLOY A UNIFORM SCOPE-OF-ARBITRABILITY TEST.

Respondents' acknowledgement that courts rely on more than one test for scope-of-arbitrability analysis of statutory and tort claims confirms the need for the Court's review. Br. Opp'n 10-11. Recognizing the existence of two distinct tests—*Mitsubishi*'s touch-matters test and the contract-reference test adopted by the Kentucky court—respondents argue for their coexistence and independent usefulness. Br. Opp'n 12.[1] But the unavoidable variation in arbitration and FAA enforcement that results from inconsistent

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[1] Respondents acknowledge courts' use of the touch-matters test but wrongly suggest that it is not widely adopted. The federal courts of appeals have consistently applied that standard, however, and their reliance on the touch-matters test stands in sharp contrast to Kentucky and Ohio's adoption of the contract-reference test, which also is used in Texas and South Carolina. See, *e.g.*, *Fazio* v. *Lehman Bros.*, 340 F.3d 386, 395 (CA6 2003) (citing touch-matters test in compelling arbitration of broker dispute); *Brayman Constr. Corp.* v. *Home Ins. Co.*, 319 F.3d 622, 626 (CA3 2003) (applying touch-matters test in compelling arbitration of workers-compensation dispute); *CK Witco Corp.* v. *Paper Allied Indus.*, 272 F.3d 419, 422-424 (CA7 2001) (citing touch-matters test and holding that labor disputes under collective-bargaining agreement were subject to arbitration); *Brown* v. *Coleman Co., Inc.*, 220 F.3d 1180, 1184 (CA10 2000) (applying touch-matters test and affirming district court's finding that the arbitration panel correctly asserted jurisdiction over the defamation claim); *Simula, Inc.* v. *Autoliv, Inc.*, 175 F.3d 716, 721-723 (CA9 1999) (applying touch-matters test and holding that antitrust claims were fully arbitrable); *Pennzoil Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (CA5 1998) ("With such a broad arbitration clause, it is only necessary that the dispute 'touch' matters covered by the [contract] to be arbitrable."); *Oldroyd* v. *Elmira Sav. Bank, FSB*, 134 F.3d 72, 77 (CA2 1998) (applying touch-matters test and holding that, because retaliatory-discharge claim touched upon matters covered by the employment agreement, it was within the scope of the agreement's arbitration clause).

arbitrability standards should not continue and warrants the Court's attention.

Attempting to diminish the effect of conflicting arbitrability standards, respondents erroneously characterize the contract-reference test as cabined within Kentucky and Ohio, failing to even acknowledge the other state-court decisions cited in the petition as examples of the growing, contract-reference-test trend. See Pet. 11 (citing *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875, 876 (S.C. App. 2005), and *Loy* v. *Harter*, 128 S.W.3d 397, 403-405 (Tex. App. 2004)). Respondents include *Aiken* and *Loy* within a discussion of decisions declining to compel arbitration of non-breach-of-contract claims, Br. Opp'n 25, but they glaringly omit that these state courts used the contract-reference standard to deny arbitration in those cases. The South Carolina and Texas decisions, in conjunction with the Kentucky and Ohio decisions currently before the Court, confirm state courts' growing reliance on the contract-reference test and its constrictive effects on arbitrability of antitrust and other statutory claims.[2]

II. THE KENTUCKY COURT'S CONTRACT-REFERENCE TEST CANNOT BE CHARACTERIZED AS MERE ANALYSIS OF THE ARBITRATION AGREEMENT.

Respondents erroneously attempt to deflect the Court's attention from Kentucky's restrictive arbitrability standard by emphasizing that court's recitation of various bedrock

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[2] Respondents erroneously suggest that the Court's denial of a petition for writ of certiorari four years ago in an unrelated case indicates that arbitrability-standard issues are generally inappropriate for review. See Br. Opp'n 27-29 (citing *UBS PaineWebber, Inc.* v. *Cohen*, 537 U.S. 974 (2002) (denying certiorari)). That denial, for whatever reason, obviously does not preclude the Court's consideration of the arbitrability issue in this case and, to the contrary, emphasizes the recurring nature of this kind of issue.

arbitrability principles that were not seriously at issue in the case. Br. Opp'n 1, 5-7, 14-17. That hollow recitation, however, cannot insulate from scrutiny Kentucky's rule requiring that a cause of action reference the underlying contract to be arbitrable. The contract-reference test is not merely a tool for assessing the factual underpinnings of a claim, irrespective of its label, see, *e.g.*, Br. Opp'n 10, but a substitute for traditional arbitrability analysis, which focuses instead on the language in the arbitration agreement and whether a claim touches matter within the scope of that agreement. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985).

The contract-reference test does not require a court to even look at the language chosen by the parties to define their agreement to arbitrate. Tellingly, in applying the contract-reference test, the Kentucky court conducted no analysis at all of the parties' arbitration agreements to reach its decision. Lacking any textual analysis, the court reasoned solely, adopting the holding of the Ohio Court of Appeals in the parallel Ohio litigation, that the "allegations . . . neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs," and expressly approved the propriety of the contract-reference test. App. 9a (quoting *Acad. of Med. of Cincinnati* v. *Aetna Health, Inc.*, 800 N.E.2d 1185, 1187 (Ohio App. 2003), *aff'd*, 842 N.E.2d 488 (Ohio 2006)). The contract-reference test drove the court's decision, not the terms of the arbitration agreement.

A simple example highlights the difference. Even if the parties had written into their contract that they specifically agreed to arbitrate any state-law antitrust claims, the Kentucky courts would have been free to disregard that agreement merely because the claims themselves made no reference to the contract. Although that kind of scenario is unlikely to present itself to a court because most arbitration agreements do not contain that kind of claim-specific

language, the decisions that use the contract-reference test to deny arbitration provide no means to enforce such a claim-specific arbitration agreement, except by using a different test.

Respondents attempt to cloak the contract-reference test's jettisoning of textual analysis with the authority of the Sixth Circuit's decision in *Fazio* v. *Lehman Bros.*, 340 F.3d 386 (CA6 2003), Br. Opp'n 10-11, but *Fazio* faithfully analyzed the parties' arbitration agreement and relied on the touch-matters standard to compel arbitration under a broad agreement. Respondents' invocation of *Fazio* relies on only a partial extraction of an excerpt of the *Fazio* holding to justify a conclusion that is completely at odds with both the form of analysis and holding of the Sixth Circuit. And respondents offer no other basis to conclude that the Kentucky court merely performed an arbitrability analysis guided by accepted principles of interpretation.[3]

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[3] Respondents attempt to sidestep the conflict caused by Kentucky's adoption of the contract-reference test by offering three untenable, alternative justifications for the Kentucky courts' refusal to compel arbitration in this case—none of which were relied on by the courts below. First, they observe that two respondents are medical societies that are not signatories to a contract with United containing an arbitration agreement, Br. Opp'n 16—ignoring that respondents are primarily individuals who are signatories bound to arbitrate with United, which creates a live controversy regarding arbitrability. Moreover, the medical societies sued solely based on associational standing—that is, on behalf of individual member-respondents who are contractually bound to arbitrate with United. Second, respondents erroneously contend that the alleged price-fixing conspiracy predates some of the business relationships and, therefore, falls outside the arbitration agreements. Br. Opp'n 19. This argument ignores that the terms of the arbitration agreement are not limited to disagreements arising after the contract's execution but instead encompass "*any* disputes" about the parties' business relationship, with no temporal constraints. See, *e.g.*, *Mail-Well Envelope* v. *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 54*, 916 F.2d 344, 348 (CA6 1990) (compelling arbitration of claims based on conduct prior to

III. THE DOMESTIC ORIGIN OF RESPONDENTS' CLAIMS DOES NOT JUSTIFY THE KENTUCKY COURT'S CONTRACT-REFERENCE TEST OR NEGATE THE RESULTING CONFLICT.

In an effort to minimize the sharpness of the Kentucky court's conflict with other courts' routine recognition of the arbitrability of antitrust claims, respondents wrongly suggest that *Mitsubishi* was confined to international antitrust claims and that the arbitrability of domestic antitrust claims is an open question in the federal and state courts. Br. Opp'n 20-22. This argument magnifies the Kentucky court's unsupportable claim that federal and state courts have been reluctant to compel arbitration of antitrust claims and its reliance on the discarded *American Safety* doctrine. App. 7a & n.7. The Court's explicit extension of *Mitsubishi* to domestic antitrust claims in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 242-243 (1987), forecloses respondents' attempt to downplay the conflict represented by the Kentucky decision and underscores the significance of the contract-reference test's exclusion of antitrust claims from arbitration. Moreover, the premise of respondents' contention that the contract-reference test does not conflict with antitrust-arbitration decisions rests on an outdated distinction between international and domestic antitrust contexts. In *Mitsubishi*, the Court rejected anti-arbitration rationales without any limitation to an international context. See 473 U.S., at 627, 632-637; see also *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441, 1442 (CA9 1994). Respondents' characterization

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effective date of agreement because court lacked positive assurance that arbitration provision did not encompass such claims). Last, although respondents contend that Kentucky could prohibit arbitration of state-law antitrust claims as a matter of state law, no one can dispute that Kentucky cannot bar arbitration under the FAA, which was the primary basis for United's motion, and the Kentucky court's opinion examined arbitrability requirements under federal law. App. 6a-7a.

of the contract-reference test as a permissible approach to domestic antitrust claims, therefore, lacks any credible basis in law and cannot justify the Kentucky court's departure from established FAA requirements and the arbitrability principles articulated by this Court.

IV. THE CONTRACT-REFERENCE TEST UNJUSTIFIABLY PRECLUDES ARBITRATION OF ANTITRUST CLAIMS.

In the face of courts' consistent recognition of the arbitrability of antitrust claims, respondents offer an uncontroversial—and irrelevant—observation that the arbitrability of antitrust claims ultimately depends on the governing arbitration agreement and that arbitration is not "*per se*" mandated for antitrust claims. Br. Opp'n 20-26. That is undoubtedly true, but respondents fail to engage the critical point that the contract-reference test effectively *per se* excludes antitrust claims from arbitrability, robbing governing arbitration agreements of any force.[4] The conflict identified by the petition is not whether antitrust claims always should be arbitrated—the focus of respondents' attention—but whether the contract-reference test permissibly precludes arbitration even when parties agree to a broad arbitration provision that reaches antitrust claims.

The contract-reference test has a particularly restrictive effect on the arbitrability of antitrust claims because they almost always can be pleaded without reference to the underlying contract, even if the allegations necessarily implicate the parties' business relationship. In this case, for

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[4] Respondents' extended discussion of *Coors Brewing Co.* v. *Molson Breweries* does nothing more than establish the unexceptional proposition that *Mitsubishi* does not mandate arbitration of all antitrust claims but, instead, requires courts to analyze the terms of the parties' arbitration agreement to determine whether an antitrust claim falls within its scope. 51 F.3d 1511, 1515-1517 (CA10 1995). That analysis of the language of the arbitration agreement never occurs under Kentucky's contract-reference test.

example, respondents allege a price-fixing conspiracy that centers on the rates negotiated by the parties. As the dissenters to the Ohio Supreme Court decision correctly observed in the parallel Ohio litigation, *Acad. of Med. of Cincinnati* v. *Aetna Health, Inc.*, 842 N.E.2d 488, 495-496 (Ohio 2006) (Lanzinger, J., dissenting), *petition for cert. filed*, 74 U.S.L.W. 3669 (U.S. May 16, 2006) (No. 05-1465), that alleged conspiracy unquestionably involves the parties' "business relationship" and, therefore, falls within the scope of their agreement to arbitrate. And the soundness of that reasoning is confirmed by the Second Circuit's price-fixing arbitrability analysis in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163, 167 (CA2 2004).

Respondents unsuccessfully attempt to distinguish the specific conflict between the Kentucky decision and *JLM Industries* by noting that the language of the arbitration agreements in the two cases was not identical. Br. Opp'n 25-26. The differences, however, are merely cosmetic—the two arbitration agreements both evidence the widest possible reach, eliminating any basis for a real distinction. Respondents also emphasize *JLM*'s international context, but the international and domestic contexts are utterly irrelevant to the arbitrability determination in both cases. Finally, respondents note the Second Circuit's cautionary comment about the touch-matters standard, but the court nevertheless used that standard to determine arbitrability. *JLM*, 387 F.2d, at 174.

The Kentucky court has joined several other states in applying a test that improperly disregards the language the parties used to define their agreement to arbitrate and, consequently, frustrates congressional intent in seeking to secure through the FAA a robust enforcement mechanism that would end, not encourage, judicial hostility to arbitration. A square conflict exists over the proper arbitrability standard, and the Court should resolve whether antitrust and other

noncontractual claims can be subjected by state courts—or federal courts emboldened by the state-court trend—to a different arbitrability test.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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